

**BROWNFIELDS STUDY GROUP  
MEETING  
SEPTEMBER 30, 2004**

**I. Attendees**

Kenn Anderson, Arthur J. Gallagher & Co.  
Jim Bannantine, Arcadis  
Brian Barofka, Wisconsin Energy  
Margaret Brunette, DNR  
Laurie Egge, DNR  
Terry Evanson, DNR  
Darsi Foss, DNR  
Mark Giesfeldt, DNR  
Dan Graff, DNR  
Art Harrington, Godfrey & Kahn  
Steve Hiniker, 1,000 Friends of WI  
Maureen Hubeler, DNR  
Kate Juneau, Natural Resource Tech.  
Bruce Keyes, Foley & Lardner  
Mike Klimu, Arthur J. Gallagher & Co.  
Larry Kirch, City of LaCrosse  
Dan Kolberg, DNR  
Dennis Lawton, STS Consultants  
Dennis Mack, DNR  
Percy Mather, DNR

Linda Meyer, DNR  
Dave Misky, City of Milwaukee  
Tom Mueller, TEMCO  
Judy Ohm, DNR  
Laurie Parsons, Natural Resource Tech.  
Boyd Possin, ECCI  
Lance Potter, DNR  
Michael Prager, DNR  
Al Rabin, Dept. of Commerce  
Bob Ramharter, DNR  
Joe Renville, DNR  
Andrew Savagian, DNR  
Jason Scott, Dept. of Commerce  
Al Shea, DNR  
John Stibal, City of West Allis  
Joy Stieglitz, Vandewalle & Assoc.  
Sam Tobias, Fon du Lac County  
Mark Thimke, Foley & Lardner  
William Walker, DOA  
Scott Wilson, Ayres Assoc.

**II. Welcome, Introductions, Agenda Repair**

**III. Biennial Budget – State Agency Updates**

2003-2005 Biennial Budget Review

Darsi Foss briefly reviewed staff reductions and budget cuts under the 2003-05 State Biennial Budget; DNR RR Program went from 102 Full Time Employees (FTEs) in FY '04 to 95.5 FTEs in FY '05 (DNR handout)

2005-2007 Biennial Budget Request

Lance Potter then went over current DNR biennial budget proposal; agency has been asked to provide in November a 10 percent reduction to administrative budgets throughout the agency; is a smaller cut vs. a 10 percent cut for the entire agency; it is also possible that the governor may request additional reductions; agency is also requesting to maintain brownfields funding

Bruce Keyes: Staffing is an ongoing concern, and if the vehicle impact fees are raised, can we get funding for that?

Potter: The DOA gave us budget instructions that included no increase in staff; however, the RR Program is making a budget request to raise the vehicle impact fee from \$9 to \$10.50

Keyes: The Department can't ask for this, but can the Study Group ask for this?

Bill Walker: Yes, a letter can be sent to the DNR, DOA, and the governor

Keyes: I'll volunteer to author a letter; but should we also be meeting with key people within the administration about brownfields budget needs?

Walker: Yes

Tom Mueller: I agree, we should go with a formal letter like we did in the past; maybe even send it to DOA and DNR; I also agree that having a meeting with them is a good idea, and then after that, if we're not where we want to be, go to Joint Finance and the Legislature; and I think even updating some of the economic facts is a good idea, we've got a whole new round of SAGs and Commerce grants; this isn't a revenue neutral program, really, it's a revenue generating program

Sam Tobias: What about the 8 or 9 jobs that were created through the federal government that were slated to end in June?

Potter: Those were created from the federal 128(a) grant; were at 1 year into the grant, with up to five years of money available

Mueller: Will we go after the grant again?

Foss: Yes, and we're the only state that got more money; some states in EPA's Region 5 got less; it's a five-year authorization from Congress

Al Rabin: I think you can extend a message to DOA about the money being extended by contracting out via state government; can't emphasize enough the savings that can be encountered by closely monitoring contracting

Tom Mueller: I think we need to advocate DNR continuing to go after that federal money

Mark Thimke: I know we're all concerned about things at DOA, but isn't it our task to make sure we're getting back to our original principles about creating a self-initiating, self-directed program, to re-invent ourselves from where we were in the 1990s

Brian Barofka: I'll endorse that, I think you really need to go back and look at what are the priorities

John Stibal: Are we looking at what other states are doing?

Thimke: I think you need to look at where we think DNR intervention is needed and where it isn't

Keyes: I would echo the sentiment that it's worth looking at; I do have some hesitation about making major institutional changes; but if there are inefficiencies in the program that we can cut out, then it's a worthy dialogue

Foss: It's a good issue, one we've taken on internally; I think the first step of course was to stop the bleeding, I think this is definitely worthy of a subgroup

Barofka: A subgroup or a parallel path; I think you already have an internal dialogue, including the Air and Water programs, so you already have that internal framework in place

Keyes: What's the timing for dialogue with DOA?

Walker: We're meeting in November

Keyes: So, we need to do this in October

Mueller: Is the increase in the vehicle impact fee for the four main brownfield items?

Potter: We haven't developed the full revenue package yet, but the fee is the largest generator for the environmental fund, it would pay for these programs

Tom Mueller: We also need to put a request in there to make the SAG grants a continuing appropriation

Potter: A continuing appropriation means it stays within that appropriation versus going back to the Environmental Fund

Keyes: Just curious – why is this not an issue for all programs?

Al Rabin: There is precedent for recapturing those funds; most of the major economic development programs in Commerce are able to recapture those funds and reassign them

#### Land Recycling Loan (LRL) and Biennial Finance Plan

Darsi Foss and Bob Ramharter provided background on the LRL; during the Sept. 14 Local Government Subgroup meeting, participants talked about the LRL and about the Biennial Finance Plan; state created the LRL in 1998 and the money comes from federal repayments from the CWA funds; there is some discretion, took \$20 million and created the LRL; have been giving out funds for five years now

Bob Ramharter: The LRL is part of the environmental improvement fund, which also includes wastewater and drinking water; the fund is jointly administered by DNR and DOA, and we're directed every two years to create a Biennial Finance Plan, where DNR and DOA have to jointly predict their needs for the next two years; that Plan goes to the governor, building commission, Joint Finance and the Legislature; the governor then puts forth a proposal for funding these program in his budget and ultimately it is approved by the Building Commission

Ramharter: It's our best projection of the demand and expected funding levels; the question is should we be earmarking an additional \$20 million; the initial \$20 million is now down to \$8.3 million, but that's all allocated, all assigned; however, history has told us that we averaged \$2.3 million per year in loans; based on that we've requested \$2.3 million

Foss: Let's say those loans close, all three, how much would be left?

Ramharter: There would be nothing left; if that scenario were to occur, the actual budget could be modified, the other thing is we can go back at the mid-biennium and ask for additional funds; we've never done it, but we could

Mueller: If we're asking for continuing funding for the LRL, it's going to be difficult if the other document/process is going to say we don't need any money at all; and there are other problems with the program that have to be changed; we're going to have to battle a bit with the Environmental Fund

Ramharter: It's not a recommendation, it's a projection based on previous needs

Stibal: It would be more useful if we get rid of the ITA (Intent To Apply), this program could be a lot more utilized if we get rid of the lead time

Foss: Mayor John Antaramian could not attend, but wanted to pass along this comment: he is strongly in favor of this program, but does not support replenishing this program until DNR and DOA commit to meet and make changes to this program

Art Harrington: Is this program part of a larger program for publicly owned treatment works? (POTW); if this group asks for increased funding for this portion of the program, there could be significant tension with the rest of the funding portions of POTW

Stibal: If we change the structure of how it's awarded, we'll get more money out; let's use the money we got and change the structure

#### Commerce Biennial Budget

Jason Scott gave brief update, Commerce budget is for \$14 million for the Brownfields grants for the biennium

**Group agreed to work with Bruce Keyes to put a letter together on the brownfield budget items (SAG, Greenspace, Commerce Brownfields, Land Recycling Loan) to go to DNR, DOA, the Governor and the Legislature; included in there is a request to make the DNR SAG grants a continuing appropriation**

#### **IV. Proposed WI BF Insurance Program (WBIP) – Update/Feedback**

Kenn Anderson provided a brief history of the WBIP: back in spring of '03, the Study Group brought up the idea of brownfields insurance as a way to deal with contaminated properties; Arthur J. Gallagher (AJG) worked as the state broker on all aspects of the program; DOA has selected AJG to be its environmental insurance broker in 2002; AJG has assisted DOA and DNR, with input from the Study Group, to design and negotiate the WBIP where parties could use environmental insurance on a program basis when redeveloping brownfields in Wisconsin

Anderson: Through the bidding process four insurance responded – AIG, XL, Quanta and Zurich; underwriting meetings were held in Milwaukee with regional RR program staff in November of 2003 to better understand the program; in December and January additional underwriting information was provided; received quotes in February and March, presented interim findings to state officials in April; in the summer met again with state officials, reviewed the proposals and came up with clarifying questions for the four insurers, some general, some specific to each insurer

Anderson: In September, DOA, DNR and AJG evaluated these four proposals; that's where we are today, there are still a couple of outstanding issues; overall we have one very good proposal, one weak and two in between

Foss: We want as many of these sites to be accepted as possible; we need to monitor how it's going, we can get some numbers/stats on what's happening, denial rate, prices, etc.; we also want a company that's going to be around awhile

Anderson: We're looking at two main areas: 1) certainty of pricing and of insurability, and 2) certainty that the state can monitor the WBIP's performance via a contract/agreement with the chosen insurer;

Thimke: I have two concerns: 1) the insurance route you're exploring is similar to discussions we've had before; you're going to force everything through DNR review; and 2) I'm still concerned that the insurance criteria will drive closure requirements

Harrington: Just from talking to Kenn, I'm convinced we have the right broker looking at this; I thought what we were talking about, spreading the risk and transactional costs, so these things are more affordable for the "middle class brownfield"; because a lot of those are not reachable without a lot of transactional costs; if this process reaches a price that's affordable, it's a good result; one of the things we have to keep in mind with this process, if we get something usable, then we have to think about staffing, if you are looking at adequate staffing when these things need review

Study Group agreed that staffing may be an issue on this one

Boyd Possin: It is important to advocate, advocate, advocate for not losing positions, everyone's going to be doing it

Anderson: We have one [insurer] that's right there on everything; there are a few outstanding issues, but nothing critical

Thimke: I think [the WBIP] is counterproductive to the whole NR 700 approach, which is to privatize the entire system; our challenge is to take DNR out of the system, and I don't see that going in this direction

Stibal: While I agree with Mark, this is the next logical step; yes we don't want more staff, but if we can do this cheaper and better and get some insurance, great

**Informational item; no action needed by Study Group**

## **V. Local Government Issue Subgroup Report**

### LGU Exemption For Solid Waste

Dan Kolberg gave a summary of what the Local Government Subgroup discussed; basically there are two options, which differed on the universe of landfills involved; there are also the technical requirements that would need to be addressed, and the transfer of liability issues

Harrington: This is one of the most important improvements; one of the big concerns for local governments are unknown waste sites; it should give comfort to the insurance underwriter; I support the option that just addresses the unlicensed sites for now and in the future, perhaps we can look to expand

Tom Mueller: Agree with Harrington; option two is the best

Dennis Mack: The Waste program is comfortable with either option, but we would need to adopt the full component of either option

Kate Juno: You need to ensure we don't confuse the Registry with "licensed" landfills

**Study Group Recommended Alternative #2 to the DNR**

## **VI. VPLE Landfill Issue**

Darsi Foss, Dennis Mack and Dan Graff explained the issue, which was discussed at the August 25 meeting of the Cleanup Policy Issues Subgroup

Graff: We're open to opening up these sites to the VPLE process, which would make 1,000s of sites available to the VPLE; we do have reservations about opening the VPLE, process to licensed landfills and approved facilities, however

Harrington: If we were to expand it to all of them, how would it inter-phase with the federal program

Graff: You'd have to look at Subtitle D and long-care requirements vs. VPLE's "waiver"; Region 5 would have to look at these

Mack: The reservation that we have is with licensed landfill owners, especially approved facilities; the owners know what they're responsibilities are, and they're perpetual

Keyes: I do see a lot of problems including licensed landfills as part of the VPLE process; I'm thinking if we make a decision about this, we should take a more conservative approach, and not include licensed landfills

**Group agreed to mirror the LGU exemption for solid waste that was just approved**

Foss: How does it work, though, if the remedy fails? The RP is no longer responsible for the failed remedy; that doesn't really work at a landfill if the leachate system fails

Laurie Parsons: There's a difference between a system going down and a pump going down

Foss: For a spill site we shut off the active system

Keyes: The issue is fundamentally allocation of risk, do you keep the party on the hook or shift risk to state or the current landowner

**Darsi Foss/DNR will send something out for folks to quickly comment on**

**Study Group also agreed that, based on Al Rabin's and Bruce Keyes' suggestions, the Study Group discuss the following issues in the future (either at Study Group meetings or in separate meetings with state agency staff):**

- Are the brownfields grants reflective of the diversity of the population in the state of Wisconsin? Do we need to do more to help the central city communities?
- Talk about ways to improve the VPLE process; might take one or two meetings
- Talk about efficiency and streamlining issues, doing things better
- No filtration barriers, need to talk capping remedies vs. just paving it over

**LUNCH**

**VII. Local Government Issue Subgroup Report (con't.)**

ERTIF

Darsi Foss gave a brief summary; the Local Government Subgroup agreed to the language submitted (in handouts); explained DOR's letter and suggestions

Stibal: like the \$1000 fee

Foss: Subgroup agreed with this as well; other than the first issue in DOR's letter, group agreed with all the proposals

**Study Group agreed to forward what the subgroup approved**

Tax Delinquent Properties

Darsi Foss also gave a brief explanation on the two proposals the subgroup approved; modify negotiated sale in lieu of bidding for tax delinquent brownfield properties and assign judgment of a tax deed without taking title

**Study Group agreed to forward what the subgroup approved**

**VIII. Cleanup Policy Issues Subgroup Report**

Aviall/Private Cause of Action

Mark Thimke gave a brief update on the case – not for immediate decision right now, U.S. Supreme Court will be making a decision in 2005

Keyes: Supreme Court will be making a decision in June, and part of me says wait to see what they say, other part says do we want to see if we can get a private cause of action with LGU's now?

Thimke: Study Group can either start the process now or wait to move until June

Foss: Are there things we could do to limit it to new sites vs. the 19,000 sites that have been closed?

**Thimke, upon the direction of the Study Group, to sound out other organizations and find out their thoughts, invite them to come talk to the Group**

**IX. Enforceability of Deed Restrictions**

Foss: Brought these ideas to the Cleanup Policy Issues Subgroup, would require significant transactional costs; Thimke provided an alternative proposal (in handout) which the group agreed to and Linda Meyer, DNR attorney, provided comments on

Joy Stieglitz: If it doesn't transfer on the deed, what's the mechanism by which we ensure future property owners are aware? Is it a buyer beware situation?

Foss: There are two mechanisms, one is the notification via the Registry vs. the old one which was relying on the deed restriction, and two is enforceability

Meyer: We suggest to amend three different statutes to make the responsibility be for the current property owner to comply with whatever conditions might be imposed on land use for maintenance of a remedy

Keyes: That raises a question about the tenant-landlord situation – could a tenant clean up and get something on the Registry without the landlord's awareness? We need to address that somehow

Possin: Where is the enforceability coming from?

Meyer: It comes from case law

Harrington: Has anybody looked at this from the Title Industry? Would their standard exceptions cover this since it's not part of their records?

Meyer: We did talk to someone from the Title Industry, and he said these restrictions don't relate to title, they relate to land use, which is not what their insuring

**Group agreed to forward this alternative, with the notice provision; also, DNR needs to talk to DATCP and Commerce about this issue; and Group voiced their opposition to the Uniform Environmental Covenants Act**

## **X. State, Federal Updates**

### Commerce Brownfields Grants and BEBR

Jason Scott gave an overview (handouts), mentioned that this year some Study Group members had an interest in tweaking the scoring system; met with those members in April; Commerce has changed the system a bit; they're using it, it's in effect but you can still provide comments on the scoring

Scott: We had \$750,000 left over from the previous biennial year, that went to a Milwaukee site; we had seven applications asking for a total of \$3 million; they were all good applications, just very little money to give out; some of those good applications jumped over to FY '05 and were considered

Scott: We have also changed from a single, once-a-year deadline to an open application process

Scott: the BEBR made two awards since January; \$200,000 to Berlin and \$210,000 to Prairie du Chien; BEBR is block grant money and can be used for public facility improvements, water, fire depts., economic development grants; you can use to a certain percentage of federal dollars (\$5 million), so far have only used \$410,000 this year; Dane, Waukesha, and Milwaukee counties and any city over 50,000 cannot apply; if anyone has further questions please ask Jason

### DNR Site Assessment Grant

Dan Kolberg gave a summary: just recently completed the awards for Round 5, still working on follow up details, there were four sites out of 50 that couldn't get access, so we're now notifying the next communities on the grant list; also most of the grant agreements are in place

Kolberg: Also, changes to NR 168 are complete, today is the effective date; Round 6 is just beginning and will be under the new rule changes; just finished training sessions in four regions in the state about the rule changes and other SAG info, had between 60-70 attendees at the trainings

Kolberg: The due date for Round 6 is November 12 because additional time is being given to allow for more time for the municipal resolutions to be done; we're also still in the process of receiving and processing reimbursement requests for Round 3 and 4; Round 3 is almost done, have quite a few still for Round 4 and initial Round 5 reimbursements are just beginning to come in



Keyes: How many applied and how many given in Round 5?

Kolberg: We had 105 applicants and 50 awards

Keyes: It's such a good program, we want to get as many awards as we can; maybe we can figure out a way to stretch the dollars out more; evaluate growing program demand in ways that we can respond to the demand to assure a fairly high rate of funding success

Stobal: You might want to take a look at the maximum amount, lower it slightly to get more of these cities in the pipeline into the process

Tobias: What about leveraging match money from local sources – can we do that now? Say give more points for two or more local governments in a partnerships?

Michael Prager: Yes, that could be something for future discussion

#### Greenspace

Michael Prager gave a brief summary: DNR gave out the \$1 million allocated during the last biennium; every recipient has signed an agreement for each project; a RAP needs to be approved and an LGU has to be in control, as well as needing a deed restriction with the land; DNR has model language for the deed restriction that's almost done and will share with grantees

#### EPA

Laurie Egge and Percy Mather gave updates on EPA news: federal grants for brownfields have a November 12 deadline; check EPA's and DNR's web site for more information

Mather: the Wisconsin Brownfields Coalition (WBC) received got \$4 million, more than anyone else in the nation; \$1 million of that goes for cleanup of petroleum contamination not eligible under PECFA, and \$3M for cleanup of contamination by hazardous substances; program will run for five years and start next month;

Mather: We'll be using federal guidelines primarily, not necessarily looking at an administrative code or state statutory language; also because this is a revolving loan program we can use existing state criteria that are out there already, with some modifications of course; we'll need to also comply with the federal requirements, Davis/Bacon, etc.

Keyes: When do you anticipate taking applications and what are the amounts or range of amounts that you're anticipating

Mather: Grants can be no larger than \$200,000; loans can be any amounts; we hope to be ready by spring of next year

Dave Misky: The maximum you can subgrant out is \$200K; that forces you to spread the money to other projects

Mather: For the One Cleanup Program, DNR has spent about a year working with Region V EPA staff on an agreement; sent draft to them in May, and to EPA headquarters in June; last word is that all EPA comments are back in Region 5 and they're working to put them together

Mather: the federal register draft rule for All Appropriate Inquiry (AAI) is out; it involves investigation in previous owners/uses, part of the qualifications for landowner qualifications to remove the potential for liability under CERCLA; comment period extended to November 30 (old one was October 25); for more information, please check the September issue of *Re News* and the September 29 and October 7 issues of the listserv

Larry Kirch: There also was a public hearing and presentations on AAI at the Brownfields 2004 conference in St. Louis

#### DNR'S Institutional Control Audit Effort

John Burnett: DNR is looking at how institutional controls (IC's) are working; reviewed 25 closed sites with IC's on them; five have a problem: with one the cap was completely removed, the redevelopment plan would replace that cap; also had one where it wasn't recorded on the deed and should've been; had another where the cap was in disrepair; right now two are back in compliance and staff are doing follow-up on the remaining three; in DNR's Northeast and Northern regions there were no problems, Southcentral had two, West Central had one and Southeast had two???; we've also made a "notice" of this in BRRTS and added the information into the site file

#### State's Closure Protocol Study

Terry Evanson provided a quick summary (article is also in September issue of *Re News*): the DNR is looking via this study at the assumptions we make to close sites using Natural Attenuation (NA); we have a protocol, types of investigation, type of monitoring, etc., and if criteria is met, we assume that NA will take care of remaining contamination; no follow up or monitoring is done to see if those assumptions are correct; the study will help DNR and Dept. of Commerce assess whether this process works

Evanson: So we looked at sites that have been closed between January, 1999, and January, 2001; a two year window where a lot of sites were closed, around 2,300 were closed; the first step we did was create a database with UW-Madison, Commerce and DNR, as well as with a grant from EPA; we selected sites from this group of 2,300 and extracted as much information as we can – geology, soil samples, groundwater flow, physical setting, wells, etc.; it takes a graduate student about 8-10 hours to extract all the data; it'll take a year to do all of that work; then we should be able to query that database

Evanson: The second step will be a field study choosing 10 sites from that select group; this summer we did two as a pilot; we will continue to do the other eight in 2005 while we finish the database; we plan to complete the study by August, 2006; the field study involves installing temporary wells and taking soil and groundwater samples and comparing this data with data available at the time of closure

Stieglitz: Are you diversifying geographically around the state?

Evanson: That's what we hope to do; we recognize that 10 sites out of 1,000 isn't definitive, but we hope to make some general statements; again, our intent is to find out if we need post-closure monitoring or changes in our protocol

**ADJOURN**